Supreme Court, U.S.
FILED
AUG 19 1988
JOSEPH E. SPANIOL, JR.
CLERK

(2)

No. 87-2079

In the Supreme Court of the United States

OCTOBER TERM, 1988

FRANK B. AND JOANN SHIRK, INDIVIDUALLY AND DOING BUSINESS AS OREGON MEAT CUTTING SCHOOL, PETITIONERS

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the court of appeals erred in holding that their violations of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. IV) 201 *et seq.*, were willful and that they were liable for liquidated damages. Their primary argument is that the court of appeals failed to give sufficient deference to the district court's findings of fact.

1. Petitioners Frank B. and Joann Shirk own and operate the Oregon Meat Cutting School and its associated retail outlets (Pet. App. A3). In 1980, an Oregon state court found that petitioners had violated the FLSA by failing to pay overtime compensation to an employee (*ibid.*). Thereafter, petitioners posted and required their employees to sign written rules specifying that " '[a]ll girls will

be on Salary,' " and "[n]o time over 40 hours a week will be Authorized [*sic*] at any time' " (*id.* at A3, A16-A17). Petitioners admonished their employees that overtime was not authorized and required them to punch time cards reflecting 40-hour work weeks, regardless of the number of hours actually worked (*id.* at A3, A17, A19, A23, A24).

Despite this overtime policy, during most of the period from December 1980 through December 1982, two of petitioners' retail outlet employees regularly worked more than 40 hours per week, remaining after closing hours to clean the outlets, store perishables, and report daily accounting totals to petitioners (Pet. App. A16, A18, A45 n.5). Petitioners knew these employees were working overtime, but failed to pay them overtime compensation (*id.* at A24, A27). In addition, petitioners entered into a separate agreement with one of these employees to pay her from petty cash funds to clean the retail outlet on Sundays (*id.* at A19-A20). This work was performed outside of normal work hours, generally by the employee's minor children, and petitioners kept no record of the hours worked or payments made (*id.* at A20).

In 1983, the Secretary of Labor filed suit in district court to enjoin, and to recover back pay for, petitioners' violations of the overtime, child labor, and recordkeeping provisions of the FLSA (Pet. App. 15). As to the overtime claim, the district court found that "particularly during the first two weeks of every month, [the employees] were unable to perform their required duties within 40 hours," and that there was "substantial evidence that the [petitioners] knew that their employees were working more than 40 hours per week" (*id.* at A26-A27). Thus, the court held, petitioners' failure to pay overtime compensation to these employees violated Section 207 of the FLSA (*id.* at A27).[1]

[1] With respect to the weekend cleaning agreement, the district court held that petitioners had not knowingly violated the FLSA's child

Turning to the Secretary's claim for back wages, the court declined to apply the three-year statute of limitations applicable to willful violations under 29 U.S.C. 255(a). The court recognized that under governing Ninth Circuit precedent, violations were willful " 'when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provision' " (Pet. App. A33, quoting *Marshall* v. *Union Pacific Motor Freight Co.*, 650 F.2d 1085, 1092 (9th Cir. 1981)). The court found that petitioners knew their employees "were covered by the FLSA," and "were working overtime hours without compensation" (Pet. App. A33). Nonetheless, the court concluded that petitioners reasonably believed their no-overtime policy satisfied their obligations under the Act. The court held, therefore, that their violations were not willful (*id.* at A34-A35). Thus, the court applied the two-year statute of limitations for back pay. The court also declined to award liquidated damages (an additional amount equal to the back wages) under 29 U.S.C. 216(b). The court reasoned that petitioners had established the good faith required by 29 U.S.C. 260 to avoid liquidated damages because petitioners honestly believed that implementation of their no-overtime policy brought them into compliance with the Act (*id.* at A36-A37).[2] For the same reason, the court refused to issue a prospective injunction (*id.* at A41-A42).

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labor provisions (Pet. App. A28-A29), but that the arrangement violated the Act's recordkeeping and overtime provisions (*id.* at A29, A31).

[2] The district court's application of the two-year statute of limitations and its refusal to order liquidated damages reduced the amounts sought on behalf of the two employees from $1,370 and $13,415 to $650 and $7,200, respectively (Pet. App. A39-A41). The court awarded the $650 requested for one employee but further reduced the $7,200 requested for the other employee to an award of $4,000 based on its rejection of the Secretary's computation of overtime hours.

The court of appeals reversed the district court's rulings regarding willfulness, liquidated damages, and a prospective injunction. Reviewing de novo the district court's application of the *Union Pacific* willfulness standard to the undisputed facts (Pet. App. A5-A6), the court held that petitioners "necessarily, as a matter of law, 'willfully' violated the FLSA," since they knew their employees were covered by the Act and were working overtime without compensation (*id.* at A6). Accordingly, the three-year statute of limitations applied (*ibid.*).

The court of appeals also disagreed with the district court's analysis of the liquidated damages issue. The court noted that under the applicable legal standard, the district court has discretion to reduce the amount of liquidated damages under 29 U.S.C. 260 only when an employer carries " 'the plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict.' " (Pet. App. A7, quoting *Marshall* v. *Brunner*, 668 F.2d 748, 753 (3d Cir. 1982)). The court reviewed de novo the application of this legal standard to the facts found by the district court. First, the court concluded that petitioners did not satisfy the subjective "good faith" component of the test because their awareness of the Act's coverage and of their employees' overtime work demonstrated that they lacked an honest intention to ascertain what the FLSA requires and to act accordingly (Pet. App. A8). Second, even assuming petitioners subjectively believed they were acting in accordance with the FLSA, they failed to establish "reasonable grounds" for their belief. The court noted that the trial court had neither considered nor applied the objective aspect of the legal test (*id.* at A9). Applying the legal test itself, the court of appeals held that the "facts in this case

simply cannot support a finding that [petitioners] had objectively reasonable grounds for believing no violation was taking place" (*ibid.*). Accordingly, the court of appeals ruled that petitioners had not carried their burden under 29 U.S.C. 260, and the district court, therefore, had no discretion to mitigate petitioners' liability for liquidated damages.[3]

2. The court of appeals' construction of the willfulness standard under the statute of limitations provision of 29 U.S.C. 255(a) is incorrect in light of this Court's decision in *McLaughlin* v. *Richland Shoe Co.*, No. 86-1520 (May 16, 1988). In that case, the Court held that the willfulness standard that triggers the three-year statute of limitations under Section 255(a) requires that the employer knew or showed reckless disregard as to whether his conduct was prohibited by the FLSA. Slip op. 5. Since the court of appeals applied a distinctly different standard, less favorable to the employer, were the issue raised in the petition, it would be proper to grant, vacate, and remand for reconsideration of the willfulness issue in light of *Richland Shoe*.

We do not, however, read the petition, in either its statement of questions presented or elsewhere, as calling into

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[3] The court remanded for further consideration of injunctive relief, as it questioned petitioners' future compliance in light of their past violations and their continued practice of having employees sign forms that no overtime was authorized, although overtime would likely be required to do their jobs (Pet. App. A12-A13). Petitioners have not challenged this aspect of the court's opinion in the petition.

[4] The petition's first four "Questions Presented" focus on whether a court of appeals can reverse a district court on the factual issue of intention; the fifth question raises the issue whether a court of appeals can ignore a statutory defense of good faith and willfulness "without explaining, in its per curiam opinion, why these provisions of [the] statute should be nullified in this case" (Pet. 6).

issue the court of appeals' construction of the standard of willfulness under Section 255(a).[4] Under Rule 21 of the Rules of the Supreme Court, "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court."

In other respects, including the issues explicitly raised in the petition, the court of appeals' decision is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant review by this Court.

Petitioners' principal argument is that the court of appeals erred in reviewing de novo the district court's conclusions regarding willfulness and liquidated damages, rather than using a clearly erroneous standard (Pet. 15-17).[5] The sole authority upon which petitioners rely is this Court's decision in *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986). In *Icicle*, the Court held that the court of appeals should not have made factual findings on its own before determining whether certain employees were seamen excluded from the FLSA, but should have remanded to the district court to make those factual findings (475 U.S.

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[5] Petitioners also challenge the adequacy of the record upon which the court of appeals based its judgment (Pet. 9-14). Petitioners' objection is meritless. First, to the extent that petitioners believed the record before the court of appeals was incomplete, they had both an opportunity and an obligation under Rules 10(b)(3) and 30(b) of the Federal Rules of Appellate Procedure to designate for inclusion in the appendix the additional record excerpts they considered necessary. Second, the specific omissions which petitioners identify—a videotape, long distance phone bills and a computerized summary of work hours (Pet. 10, 11, 13)—relate to whether petitioners' employees had, in fact, worked overtime without receiving compensation; the district court resolved this issue adversely to petitioners, and they did not challenge that finding on appeal. The omitted exhibits have nothing to do with the analysis applied by either the district court or the court of appeals to the questions of willfulness and mitigation of liquidated damages.

at 713-714). *Icicle* endorsed, however, the very different standard of review applied by the court of appeals in this case: the *Icicle* Court reaffirmed that a court of appeals can review the application of law to unquestioned findings of fact on a de novo standard. See *id.* at 714 ("If [the court of appeals] believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could * * * reverse[ ] the District Court's judgment.").

In this case, the court of appeals did not commit the *Icicle* error of usurping the district court's authority to find facts. Rather, relying on the district court's findings, the court of appeals concluded that reversal of the district court's judgment was necessary because although the "factual findings were unassailable, * * * the proper rule of law [had been] misapplied to those findings" (*Icicle,* 475 U.S. at 714). On the willfulness issue, the district court found that petitioners knew both that their employees were covered by the FLSA and that they were working overtime without proper compensation. The court of appeals applied the law to those findings to conclude that petitioners' violations were willful under the then-applicable "appreciable possibility" standard (Pet. App. A5-A6). Similarly, on the liquidated damages issue, the district court's factual findings were accepted by the court of appeals in determining whether petitioners had carried their burden under 29 U.S.C. 260 (*id.* at A8-A9). The court of appeals was persuaded, however, that the district court failed to apply the correct legal standard to the subjective good faith component of the test and failed to consider the objective component of the test. The court then proceeded to apply the legal test to the district court's facts de novo, and reversed the district court on that basis (*id.* at A9). Thus, the standard of review used by the court of appeals was fully consistent with *Icicle.*

It is therefore respectfully submitted that the petition for certiorari should be denied, or, in the alternative, the Court should grant, vacate, and remand in light of *Richland Shoe.*

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AUGUST 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60611